CODE BRILLIANT SDN BHD & ORS A

v.

HENG JI KENG & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
AZIZAH NAWAWI JC
[ORIGINATING SUMMONS NO: D-24NCC-53-2011]
25 APRIL 2014

COMPANY LAW: *Winding up - Liquidators - Appointment and removal of - Non-compliance with mandatory statutory provision - Creditors' meeting - Lack of quorum - Passing of resolution to appoint liquidators - Whether creditors served with statutory notice to convene meeting - Whether liquidators' appointment made with leave of court - Whether appointment of liquidators valid - Companies Act 1965, ss. 10, 260 & 266 - Companies (Winding-up) Rules 1972, r. 123(1)* C D

COMPANY LAW: *Meetings - Creditors' meeting - Appointment of liquidators - Convening of meeting - Failure to serve notice to creditors - Lack of quorum - Whether passing of resolution violated r. 123 Companies (Winding-up) Rules 1972 - Whether resolution void - Whether appointment of liquidators valid - Companies Act 1965, s. 260* E

CIVIL PROCEDURE: *Parties - Locus standi - Secured creditor - Removal of liquidators - Application for - Whether secured creditor had locus to initiate action - Companies Act 1965, s. 266* F

WORDS & PHRASES: *"shall" - Meaning of - Companies Act 1965, s. 260 - Creditors' meeting - Convening of - Statutory notice - Whether mandatory statutory duty imposed on company to issue notice to all its creditors* G

The second plaintiff was the receiver and manager ('R&M') of the first plaintiff ('CBSB'), a wholly-owned subsidiary of the fifth defendant ('EJSB'). The first and second defendants were the court-appointed liquidators ('the liquidators') of EJSB. CBSB was H voluntarily wound up and during the creditors' meeting, a resolution was passed to appoint the first and second defendants as the liquidators of CBSB. The plaintiffs filed an application herein pursuant to s. 266 of the Companies Act 1965 ('the Act') to remove the first and second defendants from acting as the joint I liquidators of CBSB. The fourth defendant ('SNA Consult') and the sixth defendant ('MCSB') were the creditors of CBSB and supported the application herein. The liquidators raised certain

preliminary issues in relation to the *locus standi* of the plaintiffs, *ie,* whether the third plaintiff ('PESB') was a creditor of CBSB and whether the R&M had the *locus* to commence these proceedings on behalf of CBSB as it was in liquidation. It was submitted that CBSB had entered into a money-lending agreement ('the MLA') with PESB where CBSB took a loan of RM4,490,000 from PESB. Thereafter, CBSB created a debenture in favour of PESB over the same loan. The plaintiffs argued that PESB was a proper party as it was a secured creditor by virtue of the MLA and the debenture. On the merits of the application, the issues raised for consideration were: (a) whether the appointment of the liquidators was valid under the Act; and (b) whether the liquidators would be impartial in conducting the liquidation of CBSB and/or whether they were in a position where their duty and interest were in conflict. It was argued, *inter alia*, that (i) there were non-compliance with the mandatory provisions of the Act which rendered the appointment of the liquidators invalid; (ii) there was a breach of the mandatory requirement under s. 260 of the Act when SNA Consult was not served with the notice to convene the creditors' meeting; (iii) there was a breach of r. 123(1) of the Companies (Winding-up) Rules 1972 ('CWUR') due to the lack of quorum during the creditors' meeting; (iv) there had been a contravention of s. 10 of the Act; and (v) since the first and second defendants were the liquidators of CBSB and EJSB, there would be a position of conflict with regards to their appointment as liquidators.

Held (allowing application):

(1) The plaintiffs had established the existence of the MLA with the original copy of the document tendered in court. CBSB's bank statement disclosed that CBSB had received the sum of RM4,490,000 one day after the execution of the MLA. Since the debenture was a valid document and bound CBSB, then PESB as the holder of the debenture was a secured creditor of CBSB. Thus, PESB had the *locus* to initiate this action under s. 266 of the Act. On the other hand, since the duty of the R&M was to secure the charged assets under the debenture, the R&M had no *locus standi* to commence this action on behalf of CBSB since this application was sought to remove the liquidators. (paras 11, 15 & 22)

(2) Only one creditor of CBSB, *ie*, EJSB had attended the creditors' meeting. The use of the word "shall" in s. 260 of the Act clearly imposes a mandatory statutory duty on CBSB to send the notice to convene the creditors' meeting to all its creditors. Therefore, the failure to send the requisite notices had deprived SNA Consult of its statutory right to attend the creditors' meeting. Thus, the creditors' meeting and all the resolutions passed during the meeting, including the appointment of the liquidators were a nullity. (paras 27 & 29)

(3) Under r. 123(1) of the CWUR, the quorum for a creditors' meeting is that at least three creditors are entitled to vote. Further, an inquorate creditors' meeting cannot transact any business lawfully, including the appointment of the liquidators. Based on CBSB's statement of affairs, it was clear that CBSB had creditors other than EJSB. These creditors were not present as they did not receive the pre-requisite notices. The creditors' meeting was an inquorate meeting due to the absence of other creditors at the meeting. As such, the passing of the resolution to appoint the liquidators was in violation of r. 123 and such resolution was therefore void. (paras 29 & 30)

(4) Section 10 of the Act prohibits the appointment of a liquidator who is an officer of the company in order to ensure the independence of a liquidator. Since both, the first and second defendants were court-appointed liquidators of EJSB, they were therefore officers of the company within the definition of "officer" under s. 6 of the Act. Further, the liquidators' appointment was made without the leave of the court as required under s. 10. The said appointment was therefore null and void. (paras 32 & 33)

(5) The liquidators had sued CBSB *vide* suit D6-24-457-2006 ('suit 457') in their capacity as the liquidators of EJSB. As such, there would be a conflict of interest if they were to act or continue to act as liquidators for CBSB. The fact that the liquidators were parties in Suit 457 showed that they had taken a personal interest in the dispute between EJSB and CBSB. There were reasonable grounds for the creditors, namely PESB, SNA Consult and MCSB to question the impartiality of the liquidators in conducting the liquidation of CBSB. The liquidators were in a position where their duties and interests were in conflict, which merits their removal as liquidators of CBSB (*Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals*; foll). (paras 39-41)

[The first and second defendants were removed from acting as the liquidators of CBSB and any actions taken by them during their tenure as liquidators of CBSB were held to be null and void.]

Case(s) referred to:

Advance Housing Pty Ltd (in liq) v. Newcastle Classic Development Pty Ltd (1994) 14 ACSR 230 ***(refd)***

Chi Liung Holdings Sdn Bhd v. Soon Kok Seng (Pelikuidasi Chi Liung & Sons Sdn Bhd Dalam Penggulungan) [1996] 3 CLJ 86 HC ***(refd)***

Deloitte & Touche AG v. Johnson [1999] 1 WLR 1605 ***(refd)***

K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***

Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners) [2006] 3 CLJ 360 HC ***(refd)***

Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals [2012] 2 CLJ 501 FC ***(refd)***

Wong Sin Fan & Ors v. Ng Peak Yam & Another [2013] 3 CLJ 17 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 6, 10, 111(2), 218, 236(2)(a), 260, 266

Companies (Winding Up) Rules 1972, rr. 121, 123(1), 194

National Land Code, s. 329

Companies Act 1862 [UK], s. 106(1)

For the 1st, 2nd & 3rd plaintiffs - KK Wong (Alex Tan with him); M/s AI Nathan

For the 1st & 2nd defendants - Wong Rhen Yen (Eric Tan & Emily Goh with him); M/s Lim Soh & Goonting

For the 4th defendant - Kelvin Seet (Vendee Chai with him); M/s Cheang & Ariff

For the 5th defendant - Jananee Gopal; M/s Gan, Ho & Razlan Hadri

Reported by Kumitha Abd Majid

JUDGMENT

Azizah Nawawi JC:

The Application

[1] Enclosure (1) is essentially the plaintiffs' application pursuant to s. 266 of the Companies Act 1965 to remove the first and the second defendants from acting as the joint liquidators of the first plaintiff, Code Brilliant Sdn Bhd. The application is supported by other creditors, the fourth and the sixth defendants.

The Salient Facts

[2] The second plaintiff is the Receiver and Manager ("the R&M") of the first plaintiff, Code Brilliant Sdn Bhd ("CBSB"), a wholly owned subsidiary of Eramara Jaya Sdn Bhd, the fifth defendant ("EJSB"). The R&M was duly appointed by the third plaintiff, Primaview Enterprise Sdn Bhd ("PESB") under a debenture dated 1 July 2008. PESB is a creditor of CBSB.

[3] Both the first defendant, Heng Ji Keng and the second defendant, Michael Joseph Monteiro of Messrs Ferrier Hodgson MH are court appointed liquidator ("the liquidators") of EJSB *vide* court order dated 8 July 2005.

[4] CBSB was voluntarily wound up when the directors lodged their statutory declaration with the Companies Commission of Malaysia on 18 January 2011. During the creditors meeting on 24 January 2011, a resolution was passed to appoint the first and the second defendants as the liquidators of CBSB.

[5] The appointment of the first and second defendants as the joint liquidators of CBSB is being challenged in this application. The fourth defendant, SNA Consult Sdn Bhd ("SNA Consult") is a creditor of CBSB and supports this application. The sixth defendant, Magnawise Consultancy Sdn Bhd ("Magnawise") is also a creditor of CBSB and supports this application.

The Issues

[6] The preliminary issues raised by the liquidators (and supported by EJSB) pertains to the *locus standi* of the plaintiffs, are as follows:

(i) whether PESB is a creditor of CBSB; and

(ii) whether the R&M has the *locus* to commence these proceedings on behalf of CBSB as it is in liquidation.

[7] On the merits of the application, the issues raised by the plaintiffs and supported by SNA Consults are:

(i) Whether the appointment of the liquidators as the joint liquidator of CBSB is valid under the Companies Act 1965 ("Act 125").

(ii) Whether the liquidators would be impartial in conducting the liquidation of CBSB and/or whether they are in a position where their duty and interest are in conflict.

The Findings Of The Court

The Preliminary Issues

[8] Before I deal with the merits of the application, I will deal with the two preliminary issues raised by learned counsel for the liquidators.

Issue (i) Whether PESB Is A Creditor Of CBSB And Hence Is Clothed With The *Locus* To Commence This Action

[9] The factual matrix with regards to the money lending agreement are as follows:

(i) On 4 December 2003, CBSB entered into a money lending agreement ("the MLA") with PESB where CBSB took a loan of RM4,490,000 from PESB.

(ii) CBSB received the said sum of RM4,490,000 on 5 December 2003.

(iii) On 5 June 2008, PESB presented a winding-up petition against CBSB pursuant to s. 218 of the Companies Act 1965 in D1-28-380-2008.

(iv) On 1 July 2008, CBSB created the debenture ("the debenture") in PBSB's favour over the same loan.

(v) The debenture had been duly registered with the Companies Commission of Malaysia *vide* a certificate of registration of charge dated 1 December 2009.

(vi) With the creation of the debenture, PESB filed a notice to discontinue with the winding-up petition against CBSB on 15 August 2008.

[10] It is the submission of the liquidators that PESB is not a creditor of CBSB as the loan is a dubious loan and they challenged the genuineness of the MLA. They further submit that the alleged debt is not a judgment debt and that PESB has never sued for the said monies which are overdue. Consequentially they submit that the MLA dated 4 December 2003, the debenture dated 1 July 2008 and the charge created on CBSB's register *vide* a certificate of registration of charge dated 1 December 2009 are questionable.

[11] With regards to the genuineness of the MLA, I am of the considered opinion that the plaintiffs have established the existence of the MLA with the original copy of the document tendered in court as 'exh. P1', which was duly attested by counsel, Shakir Hussain a/l Khurshed Ibrahim who gave evidence to confirm the same. It was also in evidence that a copy of CBSB's bank statement issued by Affin Bank Berhad disclosed that CBSB had received the sum of RM4,490,000 on 5 December 2003, one day after the execution of the MLA.

[12] It is therefore the submission of the plaintiffs that PESB is a proper party as PESB is a secured creditor of CBSB by virtue of the MLA dated 4 December 2003 and the debenture dated 1 July 2008. On 1 September 2009, a certificate of registration of charge was issued under s. 111(2) of Act 125.

[13] Bearing in mind that the MLA was entered on 4 December 2003 and the debenture was created on 1 July 2008, the Liquidators have failed to challenge the validity of these documents in court. Instead they mounted a collateral attack on the said documents in these proceedings. Unless and until the MLA and the debenture have been declared invalid, the said documents clearly established the fact the PESB is a creditor of CBSB.

[14] Further, on 1 December 2009 a certificate of registration of charge in respect of the debenture was issued under s. 111(2) of Act 125, which provides that the certificate of registration of charge "shall be conclusive evidence that the requirements as to the registration have been complied with". In *K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors* [2005] 1 CLJ 793; [2005] 2 MLJ 201, the Federal Court held that "the fact of registration is very significant as it renders the debenture valid and effective and it binds the parties". Therefore, the registration of the debenture under s. 111(2) of Act 125 on 1 December 2009 renders it valid and effective and binds CBSB.

[15] In the premise, since the debenture remains a valid document and binds CBSB, then PESB, as the holder of the debenture is a secured creditor of CBSB and therefore has the *locus* to initiate this action under s. 266 of Act 125.

[16] Section 266 of Act 125 does not limit any category of person who may make an application to remove a liquidator. Section 266 provides that:

> The Court may on cause shown remove a liquidator and appoint another liquidator.

[17] In *Deloitte & Touche AG v. Johnson* [1999] 1 WLR 1605, the issue before the Privy Council is whether the plaintiff, which is neither a creditor nor contributory, has any *locus standi* to invoke the statutory jurisdiction of the court to remove the liquidator as liquidators of the company under s. 106(1) of the English Companies Act 1862, which is Privy Council held that "there is no express restriction on the category of persons who may make the application", as in s. 266 of Act 125. Lord Millet held at pp. 1607 and 1611:

> Where the court is asked to exercise a statutory power, therefore the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that 'he has an interest in making the application or may be affected by the outcome.' It means he has a legitimate interest in the relief sought. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributor who is not also a creditor.
>
> …
>
> The company is insolvent. The liquidation is continuing under the supervision of the court. The only persons who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors.

[18] In any event, it is conceded by learned counsel for the liquidators that any director, member or creditor may make an application to remove and replace the liquidator. (see para. 5.15 of written submission). Therefore PESB, as a secured creditor of CBSB has the standing to commence this action to remove the liquidators.

Issue (ii) Whether The R&M, As The Receiver Of CBSB Has The *Locus* To Commence This Action On Behalf Of PESB

[19] Pursuant to the debenture dated 1 July 2008, PESB had appointed the second plaintiff as the Receiver and Manager of CBSB on 22 November 2010. Section 6.03(e) of the debenture empowered the R&M to bring any suit or proceeding in relation to the assets charged under the debenture.

[20] It is the submission of the liquidators that when PCSB went into voluntary liquidation on 24 January 2011, the R&M no longer has the *locus* to commence this action on behalf of CBSB, as the powers rest with the liquidators, the first and the second defendants.

[21] The Federal Court in *K Balasubramaniam (Liquidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors* [2005]1 CLJ 793 held as follows:

> (iii) Following the winding up, the receiver and the manager loses his status as agent of the company. He continues to retain his possessory powers as a receiver and manager whilst the liquidator exercises his statutory powers and duties under the Act. There is no question of any superior ranking. They exist side by side with each exercising his separate powers and duties conferred on them by the Act in the case of the liquidator and by the debenture in the case of the receiver and manager.

[22] It is not in dispute that the duty of the R&M is to secure the charged assets under the debenture, whereas the duty of the liquidator is to take possession of and to realise the unsecured assets to pay the unsecured creditors. Bearing in mind that the purpose of this application is not to secure charged assets under the debenture but to seek the removal of the liquidators, then clearly the R&M have no *locus standi* to commence this action on behalf of CBSB.

The Merits Of The Application

[23] On the merits of the application, the first issue is on the validity of the appointment of the liquidators as the joint liquidators of CBSB premised on certain non-compliance with Act 125 and/or the Companies (Winding-up) Rules 1972.

A Issue (i) Whether The Appointment Of The Liquidators As The Joint Liquidator Of CBSB Is Valid Under The Companies Act 1965

[24] It is the submission of learned counsel for the liquidators
B that the first and second defendants were validly appointed with the passing of the resolutions at the shareholders' meeting and the creditors' meeting on 24 January 2011.

[25] However, I agree with the submission of learned counsel for
C SNA Consult, a creditor of CBSB that there are non-compliance with the mandatory provisions of Act 125 which renders the creditors' meeting held on 24 January 2011 to be invalid, and consequentially the resolutions at the meeting to appoint the liquidators are also invalid. My reasons are as follows.

D *(a) Non Compliance With s. 260 Of Act 125*

[26] It is the submission of SNA Consult that it was not served with the notice to convene the creditors' meeting, which is in breach of the mandatory requirement of s. 260, which reads:

E

> 260. Meeting of Creditors
>
> (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting
F at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company.
>
G (2) The company shall convene the meeting at a time and place convenient to the majority in value of the creditors and shall:
>
> (a) give to the creditors at least seven clear days' notice by post of the meeting; and
>
H (b) send to each creditor with the notice a statement showing the names of all creditors and the amount of their claims.

[27] The use of the word "shall" in s. 260 of Act 125 clearly imposes a mandatory statutory duty on CBSB to send the notice
I to convene the creditors' meeting to all its creditors. Therefore, the failure to send the requisite notices had deprived SNA Consult

of its statutory right to attend the creditors' meeting. The failure to issue the statutory notice under s. 260 of Act 125 means that the creditors' meeting and all the resolutions passed during the meeting, including the appointment of the liquidators are a nullity.

(b) Breach Of r. 123(1) Of The Companies (Winding Up) Rules 1972 ("1972 WUR")

[28] It is also the submission of Mr Kelvin Seet, learned counsel for SNA Consult that the meeting was also in breach of r. 123(1) of the 1972 WUR as a meeting lacking in quorum cannot pass a resolution to appoint the first and second defendants as Liquidators. Rule 123(1) reads:

> 123. Quorum
>
> (1) A meeting may not act for any purpose except the election of a chairman, the proving of debts and the adjournment of the meeting unless there are present or represented thereat at least three creditors entitled to vote or three contributories or if the number of creditors entitled to vote or the contributories, as the case may be, shall not exceed three, all the creditors entitled to vote or all the contributories.

[29] It is not in dispute that only one creditor of CBSB, that is the fifth defendant, EJSB attended the creditors' meeting on 24 January 2011. Under r. 123(1), the quorum for a creditors' meeting is at least three creditors entitled to vote. If the number of creditors entitled to vote does not exceed three, then all creditors are entitled to vote. Based on the statement of affairs of CBSB, it is clear that CBSB has creditors other than EJSB. These creditors were not present as they did not receive the prerequisite notices.

[30] Therefore, in the absence of other creditors at the creditors' meeting, the said meeting is an inquorate meeting. Under r. 123(1) of the 1972 WUR, an inquorate creditors' meeting cannot transact any business lawfully, including the appointment of the liquidators, as the said meeting can only deal with the election of a chairman, the proof of debts and to adjourn the same. As such, the passing of the resolution to appoint the liquidators is clearly in violation of r. 123 and such resolution is therefore void.

(c) Contravention Of s. 10 Of Act 125

[31] I am also of the considered opinion that there is merit in SNA Consult submission that there has been a contravention of s. 10 of Act 125. Section 10 reads:

> 10. Disqualification of liquidators
>
> (1) Subject to this section a person shall not, except with the leave of the Court, consent to be appointed, and shall not act, as liquidator of a company:
>
> (a) ...
>
> (b) ...
>
> (c) if he is:
>
> (i) an officer of the company;
>
> ...
>
> (3) For the purposes of subsection (1), a person shall be deemed to be an officer of a company if he is an officer of a corporation that is deemed to be related to the company by virtue of section 6 ...

[32] Section 10 prohibits the appointment of a liquidator who is an officer of the company, in order to ensure the independence of a liquidator. Since both the first and second defendants are court appointed liquidators of the fifth defendant, EJSB, they are therefore officers of the company within the definition of 'officer' under s. 6 of Act 125.

[33] Despite being the court appointed liquidators of EJSB and are therefore officers of EJSB, on 24 January 2011, the liquidators accepted their appointment as liquidators of EJSB's wholly owned subsidiary, CBSB. The said appointment was made without the leave of the court as required under s. 10. Therefore, the said appointment is null and void. As the appointment of the liquidators is null and void, then they must be removed from the office as liquidator of CBSB.

[34] Learned counsel for the liquidators submitted that r. 121 and 194 of the 1972 WUR and s. 268 of Act 125 provides that "the acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification". However, I am of the considered opinion that the said provisions deal with the 'acts' of the liquidator, not on the issue of the appointment of the liquidator.

Issue (ii) Whether The Liquidators Would Be Impartial In Conducting The Liquidation Of CBSB And/Or Whether They Are In A Position Where Their Duty And Interest Are In Conflict

[35] This application to remove the liquidator is premised on s. 266 of Act 125, which reads:

> The Court may on cause shown remove a liquidator and appoint another liquidator.

[36] In *Chi Liung Holdings Sdn Bhd v. Soon Kok Seng (Pelikuidasi Chi Liung & Sons Sdn Bhd Dalam Penggulungan)* [1996] 3 CLJ 86, the High Court held as follows:

> And this Court has that power to remove the liquidator if that cause is shown; and the question for this Court is what constitutes the cause? It has been held in *Re Marseilles Extension Railway and Land Company - Law Report 4 Eq. 692; and again in Re British Nation Life Assurance Association* V.C.M 1872 (27 April-4 May);
>
> > That the Court may remove a liquidator appointed by a company even without there being any misconduct alleged against him, if it appeared on the whole that it was for the benefit of the company in liquidation that he should be removed.

[37] The Federal Court in *Wong Sin Fan & Ors v. Ng Peak Yam & Another* [2013] 3 CLJ 17 has cited with approval the decision of Justice Ramly Ali in *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners)* [2006] 3 CLJ 360, where His Lordship sets out the relevant legal principles applicable to an application to remove a liquidator. At pp. 369-371, His Lordship comprehensively held as follows:

> For convenience, the court, set out below the relevant legal principles applicable to an application to remove a liquidator:
>
> (a) A liquidator appointed by the court can only be removed by the court "**on cause shown**". Section 232 of Companies Act 1965.
>
> (b) The court does not have an unfettered discretion as 'cause must be shown'. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates.
>
> (c) The *normal ground for removal is that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict.*

(See: (i) *In re Sir John Moore Gold Mining* [1879]12 Ch. Div 325, 331;

(ii) *Advance Housing v. Newcastle Classic Developments* [1994] 12 ACLC 701; and

(iii) *Commonwealth of Australia v. O'Reilly* [1984] 52 ALR 031).

(d) As to what constitutes a conflict of interest, there has to be a real and not merely theoretical possibility of conflict before a liquidator can be removed. (*Advanced Housing (supra)*).

(e) A liquidator may act even though there has been a prior involvement with the company, provided that the involvement is unlikely to impede the liquidator from acting impartially. (*Advanced Housing (supra)*).

(f) In *Advanced Housing (supra)* there was an actual conflict because the liquidator had to adjudicate on whether payments made to his firm immediately before the company went into liquidation constituted an unfair preference.

(g) It is an integral part of a liquidator's duty to investigate the affairs of the company from its foundation onwards. (*Commonwealth of Australia v. O'Reilley (supra)*).

(h) A liquidator who fails to investigate the affairs of the company to the prejudice of an applicant is in neglect of his duty and can be removed. (*In re Sir John Moore Gold Mining Company (supra)*).

(i) It cannot be a ground for removal that a liquidator is carrying out his duty to investigate the affairs of the company, even though some interested parties may object.

(j) In a case where the application for removal is by a creditor, all the creditors must be given notice of the application or it must be shown conclusively that the removal is for the benefit of all creditors. (In *re White Cliffs Dredging Co.* [1893] 11 NZLR 711).

(k) A liquidator is not bound to pursue a claim on behalf of the company, unless he believes that it has a reasonable prospect of success. (*In re George A Bond and Company Ltd.* [1932] SR (NSW) 301).

(l) Where there are no assets which can be imperiled by the continuance in office, fair play to the liquidator may be the decisive factor. (*In re George Bond (supra)*).

(m) Fair play to the liquidator is not to be left out of sight. (*Chun Boon Chin v. JM McCormack & Ors* [1978]1 LNS 33 [1979]2 MLJ 156 at 158).

(n) In *Adam Eyton Limited Exparte Charlesworth* [1887] 36 Ch. 299, the applicant for removal of liquidator was required to give an undertaking to pay all costs and expenses of the liquidator on solicitor and client basis. (emphasis added)

[38] It is not in dispute that the first and the second defendants are the liquidators of CBSB, a wholly owned subsidiary of EJSB. The liquidators are also the liquidators of EJSB. In view of such peculiar position, the issue then is whether there is a position of conflict with regards to their appointment as liquidators of CBSB as they are also the liquidators of the EJSB. In other words, the issue is whether the liquidator has failed to act impartially or is in a position where his duty and interest are in conflict. (see *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd (supra)*).

[39] Having heard the evidence, considered the documents and submissions of the parties, I am of the considered opinion that the liquidators cannot be said to be impartial in conducting the liquidation of CBSB and are also in a position where their duties and interests are in conflict, which merits their removal as the liquidators of CBSB. My reasons are as follows:

(i) In Suit D6-24-457-2006 ("suit 457"), EJSB and the liquidators have sued CBSB to recover 44 parcels of land. Since the liquidators have sued CBSB in their capacity as the liquidators of EJSB, there would be a conflict of interest if they are to act or continue to act as liquidators for CBSB. The suit could have been taken by EJSB alone as s. 236(2)(a) of Act 125 allowed the liquidators to "bring or defend any action or legal proceedings in the name and on behalf of the company"; without the involvement of the liquidators. The fact that the liquidators are parties in suit 457 shows that they have taken a personal interest in the dispute between EJSB and CBSB. As such it cannot be said that the liquidators, after having sued CBSB, can act fairly towards the affairs of CBSB. I am also of the considered opinion that in such circumstance, the liquidators are in a position where their duty and their interest are in conflict.

(ii) Pursuant to suit 457, EJSB was ordered to pay security for cost to CBSB. But before the hearing on 10 December 2009 on the issue, the liquidators had issued special notices to convene an EGM to remove the directors of CBSB. The first defendant gave evidence that he had appointed Mr Lim and Ms Lim, who had issued a letter to CBSB to liaise with the assistants of the first defendant. The services of CBSB's solicitors were terminated and CBSB was directed not pursue suit 457. As such, I agree with the submission of learned counsel for the plaintiffs that the said facts shows that the liquidators cannot be said to be acting in the best interest of CBSB.

(iii) On 13 January 2012, the court has granted leave to CBSB to commence action against the liquidators for damages pursuant to s. 329 of the National Land Code. As the liquidators have a personal interest in the said suit, if they are to remain as the liquidators of CBSB, there is clearly a position where their duty and interest are in conflict. If the liquidators are permitted to continue as liquidators of CBSB, their duties to CBSB's creditors to recover the debts of CBSB would certainly be in conflict with their personal interests in the impending suit where the liquidators are likely to dispute their liability.

(iv) Several orders on costs against the liquidators have been granted by the court which remains unpaid. The liquidators are debtors of CBSB pursuant to the court orders issued in suit 457 and in respect of the appeal against the decision in suit 457 in W-02(IM)-1698-2010, where the Court of Appeal ordered cost of RM15,000 against both EJSB and the liquidators. As such, I agree with the submission of learned counsel for the plaintiffs that where the liquidators owes money to CBSB, there is clearly a conflict of duty and interest that merits the liquidators to be removed from running the affairs of CBSB.

(v) With the above background suit between CBSB and EJSB, and with the first and second defendants acting as the liquidators of EJSB, it cannot be said that both the first and the second defendants can act impartially as the liquidator of CBSB.

[40] In *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501; [2012] 2 MLJ 713, the Federal Court has applied the case of *Advance Housing Pty Ltd (in liq) v. Newcastle Classic Development Pty Ltd* (1994) 14 ACSR 230 on the correct approach pertaining to apparent conflict at p. 233:

> In **performing his functions the Liquidator must both be and appear to be independent and impartial** of the creditors;
>
> ...
>
> ... In short, the *question should be whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator's part* in the circumstances by reason of prior association with the company or those associated with it, including creditors or indeed any other circumstance. (emphasis added)

[41] Applying the above principle, I am of the considered opinion that there are reasonable grounds for the creditors, namely PESB, SNA Consult and MCSB to question the impartiality of the liquidators in conducting the liquidation of CBSB. I am also of the considered opinion that the liquidators are in a position where their duties and interests are in conflict, which merits their removal as the liquidators of CBSB. I am also of the considered opinion that it is for the benefit of the company in liquidation, CBSB that the liquidators be removed (see *Chi Liung Holdings Sdn Bhd v. Soon Kok Seng*).

Conclusion

[42] Premised on my findings above, the first and the second defendants are hereby removed from acting as the liquidators of CBSB, the first plaintiff and that any actions taken by them during their tenure as the liquidators of CBSB are null and void. Until the appointment of a new liquidator by this court or by the creditors, the official receiver is appointed the provisional liquidator of CBSB.